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In the Supreme Court of the United States

Pravin D. Patel; Aruna P. Patel; Sanjay Patel; Harivandan P. Patel; Hansa Patel; Amrut N. Patel; Sita Patel; Jayesh Patel; Suresh Patel; Mahesh Patel; Bhavabhai Patel; Vibhakar B. Patel; Mahendra Patel; Vimalaben V. Patel; Markan Thakar; Chandravadan K.P. Shastri; Pushpa C. Shastri; Vijay K. Shastri; Bhagwatiben V. Shastri; Rajendra Shastri; Anita Shastri,

Petitioners,

v.

City of San Bernardino, a Municipal Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The decision of the Ninth Circuit should not be allowed to stand, because it incorrectly held that petitioners could only pursue remedies under 42 U.S.C. § 1983 for any damages that accrued after the state courts overturned the tax, and denied petitioners the right to seek retrospective relief under 42 U.S.C. § 1983 prior to the state courts overturning the tax even though petitioners had brought this suit after the tax was invalidated and declared unconstitutional.

Respondent's Brief in Answer to the Petition for Writ of Certiorari does not demonstrate any valid reasons why the Petition, which presents a unique and substantial federal question never decided before by this Court, should not be granted.

REASONS FOR GRANTING THE WRIT

The question of whether the Tax Injunction Act or Principles of Federalism and Comity bar a 42 U.S.C. § 1983 suit for retrospective damages after a state tax system has been declared invalid by a state court is an important question of federal law.

Petitioners ask this Court to articulate the limits of the Tax Injunction Act ("TIA") and the principles of federalism and comity when a damages suit is brought under 42 U.S.C. § 1983 after a state court has declared the state tax system constitutionally invalid and the tax system has been halted.

Petitioners respectfully submit that the question presented by the Petition for Writ of Certiorari is novel and unique regarding the limits of the TIA and the principles of federalism as the Court has never decided the narrow issue

presented here. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed. 2d 271 (1981) appears to authorize petitioners' position that they may seek such retrospective relief. Accordingly, this is "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c).

The respondent's argument that no extraordinary reasons merit review of the Ninth Circuit's published decision in 2002 ("Patel I") (App. C, 13a-20a) is without merit. The Court has never articulated a doctrine that in exercising its jurisdiction to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeal will only do so in an extraordinary case. Respondent offers no case authority for this remarkable proposition. (Answer to Petition, pg. 8).

In *Major League Baseball Players Ass'n v Garvey*, 532 U.S. 504, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001), the Court rejected an argument made by respondent *Garvey* that contended that because the Association's petition was filed more than 90 days after the Court of Appeals decision in *Garvey I*, that the Court cannot consider a challenge raising issues resolved in that decision. *Id.*, 532 U.S. at 508 n. 1, 121 S.Ct. 1727 n.1.

In rejecting such an argument, the Court stated:

> "But there is no question that the Association's petition was filed in a sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Id.*, 532 U.S. at 508, n. 1, 121S.Ct. n.1 (internal citations omitted).

The Court, and the prior decisions cited by the Court in support of its exercise of jurisdiction to review *Garvey I*, never mentions or suggests that in the exercise of such jurisdiction there must be extraordinary reasons to merit review. No such doctrine has ever been formulated by the Court in prior cases as the Court is not constrained by the "law of the case" doctrine as long as certiorari is sought in a timely manner from the most recent decision of the court of appeals. The petition in this case was timely with respect to the latest decision by the Ninth Circuit and the request for review of *Patel I* is appropriate.

Respondent's further argument that petitioners propose to "split all litigation concerning state and local tax systems into two pieces, with all refund and damages issues litigated in federal courts, would cause precisely the interference with state and local tax systems addressed by this Court in *Fair Assessment* and *National Private Truck Council*," (Answer to Petition, pg. 16), is directly contradicted by *Fair Assessment*, the TIA and the Court's case law prior to the adoption of the TIA.

In *First National Bank of Greeley v. Board of Commissioners of Weld County*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed 784 (1924), the Court held that before a litigant complaining of alleged over assessment of taxes may bring a damages action grounded on the Constitution or statutes of the United States, that litigant must fully exhaust any administrative or state remedies afforded by the State.

Although *Weld County* did not explicitly state the basis for its holding, *Weld County* seems to be grounded on the same state remedy exhaustion principles discussed in *Fair Assessment* that have guided federal equity courts and later

.nbodied in the TIA. *Fair Assessment*, 454 U.S. at 103-115, 102 S.Ct. at 180-185.

While the Court has held that exhaustion of state remedies is not a precondition to a suit brought under the Civil Rights Act, *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), Congress has provided in adopting the TIA that federal courts should refrain from hearing suits brought under 42 U.S.C. § 1983 until state remedies are exhausted except where the state remedies are not adequate.

However, in enacting the TIA, Congress did not completely foreclose federal courts from hearing suits for damages in state tax cases "if the requisite elements of Federal jurisdiction existed." H.R. Rep. No. 1503, 75th Cong., 1st Sess., 3 (1937); ("[T]he aggrieved party is left to . . . his suit at law in the Federal courts if the essential elements of Federal jurisdiction are present.") H.R. Rep. No. 1503, at 4 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525-526, 52 S.Ct. 217, 219-220, 76 L.Ed. 447 (1932)) .

Petitioners clearly met the "requisite elements of Federal jurisdiction," by first exhausting state remedies and invalidating the tax ordinance in the state courts before bringing this federal action. Respondent's concern of two-tiered litigation is precisely what is jurisdictionally mandated by the TIA and this Court's precedents.[1]

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[1] The respondent's assertion that this suit is essentially a suit for attorney fees under 42 U.S.C. § 1988 has no basis in the record, nor does respondent cite to the record. The suit was clearly brought to vindicate petitioners' constitutional rights.

Respondent's additional argument that petitioners lack standing and that the case is moot is also without merit. Nowhere in either the district court opinions or decisions by the Ninth Circuit in *Patel I* and *Patel II* is there even a suggestion of a standing or mootness issue. (Pet. App. A-D, 1a-36a). Nor did respondent ever raise such an issue during the entire history of this litigation.

Now, for the first time, respondent raises the issue in response to the petition and the sole basis for such an argument relies on subsequent and irrelevant state litigation that ensued between the parties regarding the respondent's subsequently adopted tax ordinance. In addition, respondent principally relies on a state court published opinion and the unpublished memorandum decision in the subsequent litigation in making the standing and mootness arguments. (Answer to Petition, pp. 4-7).

After the tax ordinance subject to this case was invalidated, the respondent by way of a special voter's election adopted a new transient occupancy tax ordinance that was once again subsequently challenged on federal constitutional due process grounds in a state court action by the petitioners' hotel/motel association.[2] *City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, E03/069, 2005 Cal.App.Unpub. Lexis 11114.

In 2002, the California Court of Appeal found the new tax ordinance constitutionally suspect on federal due process

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[2] The challenge to the new ordinance was similar to the due process challenge originally brought by the association to the original ordinance. See App. C at 14a citing *City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, 59 Cal.App.4th 237, 69 Cal. Rptr.2d 97, 101-04 (Cal. Ct. App. 1997).

grounds and the respondent once again adopted a new tax ordinance after a special voter's election. *Id.* The petitioners' association then amended its complaint to include not only a constitutional challenge to the second adopted tax ordinance but also a tax refund claim on behalf of the citizens of the City of San Bernardino with respect to collection of the tax as to the tax ordinance invalidated in 2002. *Id.* The state court of appeals held, on the basis of state law, that since the association members did not pay the tax that they had no standing to seek third party refunds. *Id.*

The subsequent state court litigation had nothing to do with this federal action which deals with petitioners' individual civil rights claims as to their collection of the tax on the original tax ordinance. In this litigation petitioners are not seeking third party refunds but damages with respect to their individual civil rights violations under an unconstitutional takings theory in the mandatory collection of a tax under a regulation that was unconstitutional. The Ninth Circuit recognized that petitioners were not seeking refunds but individual damages under this theory and stated this fact in *Patel I*. (Pet. App. C, 18a n. 2) . Petitioners satisfy Article III standing requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

March 14, 2007

Respectfully submitted,

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